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January 12, 2007

VIA EMAIL AND FEDERAL EXPRESS

Office of Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Attention: Dolores White, Staff Services Analyst

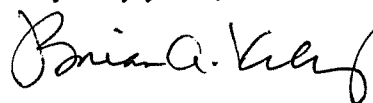
**Re: RWQCB File No. 07S0183; Walnut Creek Manor LLC Petition for Review
and Stay of Enforcement of Order Pending Review**

Office of Chief Counsel:

Please find enclosed the Petition for Review and Stay of Enforcement of Order Pending Review from Walnut Creek Manor LLC ("WCM"), in connection with both (a) the Water Code section 13267(b) order issued to WCM on December 14, 2006 by the Regional Water Quality Control Board – San Francisco Bay Region ("Regional Board") and (b) the Regional Board's failure to enforce Water Code section 13267(b) orders previously issued to Mayhew Center LLC.

We believe that all exhibits referenced in this petition are in the records of the Regional Water Quality Control Board – San Francisco Bay Region. Given that the Geotracker document service on the State Water Resources Control Board website does not list all of these documents, however, we have enclosed a CD containing all exhibits referenced in this petition in .pdf format for the convenience of the State Board. A hard copy of any of these documents will be provided upon request.

Very truly yours,



Brian A. Kelly

cc: Mr. Bruce H. Wolf, RWQCB – San Francisco Bay Region
Mr. Dean Dunivan, Mayhew Center LLC
Mr. Milt Eberle, Walnut Creek Manor LLC

Enclosures

1 Brian A. Kelly (SBN 124738)
2 Andrew Thomas Lloyd (SBN 199367)
3 DUANE MORRIS LLP
4 One Market Street, Spear Tower, Suite 2000
5 San Francisco, CA 94105
6 (415) 957-3000

7 Attorneys for Walnut Creek Manor LLC

8
9 **BEFORE THE**
10
11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

12 In the Matter of the California Regional Water
13 Quality Control Board's Issuance of a Section
14 13267(b) Order Requiring Report on Soil and
15 Groundwater Characterization and Site History of
16 Walnut Creek Manor, Walnut Creek, Contra Costa
17 County and Regional Board's Failure to Enforce
18 Section 13267(b) Orders Previously-Issued to
19 Mayhew Center, LLC, Pleasant Hill, Contra Costa
20 County (RWQCB File Nos. 07S0183),

**PETITION FOR REVIEW AND STAY
OF ENFORCEMENT OF ORDER
PENDING REVIEW; POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION; REQUEST FOR
EVIDENTIARY HEARING**

21 In accordance with Section 13320 of the California Water Code, Petitioner Walnut Creek
22 Manor, LLC ("WCM") hereby petitions the State Water Resources Control Board ("State Board") to
23 review the Section 13267(b) order issued to WCM on December 14, 2006 by the California Regional
24 Water Quality Control Board – San Francisco Bay Region ("Regional Board") in connection with
25 the site investigation of certain properties in Walnut Creek and Pleasant Hill, California (Exhibit 1,
26 the "WCM Order").¹ In addition, WCM petitions the State Board to direct the Regional Board to

27 ¹ All Exhibits referenced in this petition should be part of the record at the Regional Board. Given
28 that the Geotracker document service on the State Water Resources Control Board website does not
show the complete record, WCM has attached, with the Federal Express copy, a CD with all

1 promptly enforce its previously ignored orders to Mayhew Center LLC ("MC"). In particular,
2 Petitioner requests that the State Board:

3 (1) hold in abeyance the December 14, 2006 Water Code section 13267(b) order
4 issued to WCM on the grounds that requiring a third investigation at the WCM
5 property before any Regional Board approved site investigation has been conducted
6 at the neighboring property where historical electronics manufacturing operations
7 were conducted would be premature and would result in duplicative and costly
8 investigation activity that would impose an undue burden on WCM far in excess of
9 any marginal utility potentially gained by a third investigation. Moreover, despite
10 conclusory statements contained in the December 14, 2006 Water Code section
11 13267(b) order, the Regional Board lacks any evidence, let alone substantial
12 evidence, to support a suspicion that there has at any time been a discharge of PCE
13 from WCM, which at all pertinent times has been a seniors-only residential
14 community²; and,

15 (2) to direct the Regional Board to take action to enforce, not ignore, the prior Water
16 Code section 13267 orders issued to the neighboring property owners, MC, where
17 historical electronics manufacturing operations were conducted and evidence of
18 solvent use is overwhelming. On November 3, 2006, counsel for WCM requested
19 that the Regional Board take action to enforce investigation orders directed to MC; on
20 December 14, 2006 the Regional Board failed to act as requested, and instead opted
21 to ignore a history of recalcitrance by MC. (Exhibit 2, November 3, 2006 Duane
22 Morris Letter to Regional Board, and Exhibit 3, the "MC Order", respectively).

23 **1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF THE**
24 **PETITIONERS:**

25 Walnut Creek Manor, LLC
26 Attn: Mr. Milt Eberle
27 1686 Union Street, Suite 306
28 San Francisco, CA 94123
(415) 673-4321
wgidinc@aol.com

All materials in connection with this Petition for Review should also be provided to WCM's
counsel at the following address:

referenced documents in .pdf format for the convenience of the State Board. Should a hard copy of
the exhibits be helpful, it will be provided upon request.

² WCM does not object to conducting reasonable further soil and/or groundwater sampling activity,
if necessary, after a Regional Board approved soil and groundwater investigation has been conducted
at the site that is the most likely discharger of the PCE contamination. As the Mayhew Center
Property has yet to be properly characterized, conducting a third round of sampling activity at WCM
before the scope and extent of the PCE contamination at a former electronics manufacturing plan is
known would be wasteful, inefficient, and contrary to the law.

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2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

As noted above, petitioners request that the State Board review both (1) the December 14, 2006 Water Code section 13267(b) order issued to WCM and (2) the failure of the Regional Board to enforce its prior Water Code section 13267(b) orders issued to MC.

3. DATE ON WHICH THE REGIONAL BOARD ACTED AND FAILED TO ACT:

The Regional Board issued the WCM Order on December 14, 2006. (Exhibit 1, WCM Order). At the same time, the Regional Board issued the MC Order, which purports to “supersede and replace” all previous directives, including previous Water Code section 13267(b) orders (Exhibit 3, MC Order), and therefore must be interpreted as a failure to take enforcement action, as requested by WCM on November 3, 2006. (Exhibit 2, November 3, 2006 Duane Morris Letter to Regional Board).

4. FULL AND COMPLETE STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER:

I. Introduction

On December 14, 2006, the Regional Board issued the WCM Order requiring that WCM “submit a report on soil and groundwater characterization and site history” for the Walnut Creek Manor Property in connection with the Regional Board’s ongoing investigation into the source of tetrachloroethylene (PCE) contamination. (Exhibit 1, WCM Order). The requested investigation is

1 the third Water Code section 13267(b) order issued to this seniors-only residential community
2 requiring soil and groundwater investigations. Conducting a third soil and/or groundwater
3 investigation prior to requiring and obtaining appropriate soil and groundwater investigation at the
4 site of the former electronics manufacturing operation would, at best, result in a haphazard and
5 random approach to investigation in violation of the requirements of the Water Code and of State
6 Board Resolution 92-49. Indeed, the Regional Board expressly recognized that “the need for further
7 investigation on [WCM property] cannot be adequately evaluated without obtaining the additional
8 soil and groundwater data at Mayhew Center.” (Exhibit 4, August 4, 2006 Regional Board Letter to
9 MC)
10

11 Not only is a third soil and groundwater investigation at WCM premature at this time, the
12 Regional Board has no evidence and identifies none in the challenged WCM Order, to suspect
13 Walnut Creek Manor of discharging PCE; to the contrary, all available evidence confirms the
14 obvious: the source of the PCE contamination is the site of a former electronics manufacturing plant,
15 presently known as Mayhew Center, whose owners have yet to perform any regulatory-approved site
16 characterization. Despite several years of inaction and refusal by MC to comply with regulatory
17 orders, the Regional Board – without any rational basis and in dereliction of its duty under California
18 law – has failed to enforce its repeated orders seeking environmental data relevant to PCE
19 contamination at the former electronics manufacturing plant. Simultaneously, the Regional Board
20 has acted in an arbitrary and capricious manner by issuing a third order to WCM, in an apparent
21 effort to mollify the recalcitrant MC.
22
23

24 For these reasons alone, the Regional Board cannot rationally justify the need for an
25 investigation at the Walnut Creek Manor Property at this time, and WCM respectfully requests that
26 the State Board direct the Regional Board to hold in abeyance any further investigatory activity at
27 the senior’s residential complex pending a proper and approved site investigation by MC that
28

1 characterizes the scope and extent of PCE contamination at the location of the former electronics
2 manufacturing plant. Moreover, although the Regional Board has inexplicably ignored pursuing any
3 investigation and site characterization of Mayhew Center, the Regional Board has more recently
4 recognized what is obvious: that the investigation must proceed at the location of the Mayhew
5 Center Property where historical electronics manufacturing operations took place, as this is the likely
6 source of the PCE contamination. (Exhibit 4, August 4, 2006 Regional Board Letter to MC; see
7 also, Exhibit 5, January 13, 2006 Tri-S Letter Report).

9 As early as May 2003, the owners and operators of the Mayhew Center disclosed that this
10 site had been home to an electronics manufacturer, an industry known for its use of volatile organic
11 compounds, including PCE. (Exhibit 6, May 30, 2003 MC Letter to Regional Board).³ Despite
12 possessing this critically important site history, the Regional Board has consistently shirked its
13 obligation to proceed with a rational investigation and continues to refuse to enforce its orders
14 against MC seeking to obtain data regarding the PCE contamination, its source and extent.

16 WCM will continue to cooperate with reasonable requests by the Regional Board to assist in
17 determining the scope and extent of the PCE contamination. However, it is illogical and irrational to
18 pursue further investigation at the Walnut Creek Manor Property before the Regional Board has
19 obtained reliable data regarding the scope and extent of PCE contamination at the Mayhew Center
20 Property, which all available evidence points to as the discharger of the PCE contamination.
21 (Exhibit 5, January 13, 2006 Tri-S Letter Report, at 2). Indeed, as recognized by the Regional
22 Board, unless and until MC provides complete and accurate soil and groundwater data, it is

24 ³ Moreover, until recently the Regional Board did not even disclose this critically important site
25 information to WCM, despite the fact that such site history was directly material to WCM's past
26 work-plans and environmental investigations. Indeed, Etch-Tek, the company that conducted
27 electronics manufacturing operations at the Mayhew Center moved in the 1980s to a location in
28 Concord, California, which was also the subject of a Regional Board investigation regarding PCE
soil and groundwater contamination. (Exhibit 7, January 30, 2002 Aqua Science Engineers, Inc.
report regarding PCE contamination at the Etch-Tek Concord site)

1 premature for WCM to conduct further site investigation. (Exhibit 4, August 4, 2006 Regional
2 Board Letter to MC).

3 To address the Regional Board's uneven enforcement in this investigation, WCM hereby
4 petitions the State Board to: (1) order that any investigation contemplated by the WCM Order be
5 held in abeyance, (2) stay the enforcement of the WCM Order pending a resolution of this petition,
6 and (3) order that the Regional Board act to enforce the orders it has previously issued to MC
7 pursuant to Water Code section 13267(b).
8

9
10 **II. The Regional Board Lacks Any Substantial Evidence to Support a Suspicion**
11 **that Walnut Creek Manor Discharged any PCE and a Third WCM Investigation**
12 **at this Time Does Not Bear a Reasonable Relationship to the Need for, or**
13 **Benefits to be Obtained from, Such a Report. Therefore, The State Board Must**
14 **Direct the Regional Board to Hold the WCM Order In Abeyance.**

15 The Water Code provides that the Regional Board may require that:

16 "any person who has discharged, discharges, or is suspected of having discharged or
17 discharging . . . shall furnish, under penalty of perjury, technical or monitoring reports
18 which the regional board requires. The burden, including costs, of these reports shall
19 bear a reasonable relationship to the need for the report and the benefits to be
20 obtained from the reports. In requiring those reports, the regional board shall provide
21 the person with a written explanation with regard to the need for the reports, and shall
22 identify the evidence that supports requiring . . . the reports." Cal. Water Code
23 §13267(b)

24 To be an appropriate exercise of its statutory authority to seek a third report from WCM, the WCM
25 Order must, first, be based on a suspicion supported by substantial evidence that WCM has
26 discharged PCE. *In the Matter of the Petition of Stinnes-Western Chemical Corporation*, 1986 Cal.
27 ENV. LEXIS 18 (1986) ("in order to uphold a Regional Board action, [the State Board] must be able
28 to find the action was based on substantial evidence."). But there is no evidence, let alone
substantial evidence, that supports a credible suspicion that this seniors-only retirement community
has discharged PCE. Indeed, all available data, including the data collected as part of WCM's
compliance with the two previous Water Code section 13267(b) orders and in the period since,
establishes that the PCE contamination originates on the Mayhew Center Property and not from the

1 Walnut Creek Manor Property. (Exhibit 5, January 13, 2006 Tri-S Letter Report, at 2). Second, the
2 challenged WCM Order fails to meet the requirement that the costs to comply must “bear a
3 reasonable relationship to the need for the report and the benefits to be obtained from the reports.”
4 Water Code section 13267(b). The WCM Order fails to meet either of these statutory requirements
5 and therefore cannot be sustained by the State Board.
6

7 **A. The State Board Must Direct the Regional Board to Hold in Abeyance the Third**
8 **WCM Order Because the Investigation Called for Imposes a Burden That Bears**
9 **No Reasonable Relationship to the Need for, and the Benefits to be Obtained**
10 **from, the Report.**

11 The WCM Order seeks to prematurely impose on WCM an obligation to create and carry out
12 a third workplan to investigate the soil and groundwater on and beneath Walnut Creek Manor by
13 conducting extensive tests over an area of some sixty thousand square feet. (Exhibit 1, WCM Order).
14 To date, WCM has expended in excess of \$150,000 in environmental consultant costs alone to
15 comply with the two prior Regional Board directives and to investigate and report to the Regional
16 Board about the PCE found in the groundwater at the MC site. (Exhibit 2, November 3, 2006 Duane
17 Morris Letter to Regional Board). Along with Water Code section 13267(b), the procedures set
18 forth in State Board Resolution No. 92-49 (“Res. 92-49”), establish that “the burden, including costs
19 . . . [must] bear a reasonable relationship to the need for the reports and the benefits to be obtained
20 from the reports.” Res. No. 92-49, at III.B.

21 The costs imposed by the WCM Order, like the previous Water Code section 13267(b) orders
22 may be variable, but are certainly large. Though the Regional Board’s order has grossly
23 underestimated those costs, any investigation at this time at Walnut Creek Manor – as the Regional
24 Board itself has conceded – will provide no value to the overall investigation unless and until MC
25 meaningfully complies with the series of Water Code section 13267(b) orders issued to it over the
26 past three-and-a-half years. (Exhibit 4, August 4, 2006 Regional Board Letter to MC). Sadly,
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1 despite the passage of many years, the Regional Board still has no reliable data from Mayhew
2 Center. Without such data, there is no benefit to be obtained from randomly drilling more holes at
3 Walnut Creek Manor. The need for and location of any future borings is contingent upon a clear
4 understanding of the extent of PCE contamination caused by electronic manufacturing and other
5 industrial operations at the Mayhew Center Property.
6

7 It cannot be disputed that the costs involved in a third soil and groundwater study are
8 substantial. While the Regional Board recognizes that it must make a cost-benefit analysis, it
9 completely misjudges what the relevant costs might be. In the WCM Order, the Regional Board sets
10 out a long and detailed list of requirements it proposes that WCM consolidate into a workplan. The
11 Regional Board notes, "based on its own experience" that the cost of a workplan should be "less than
12 \$10,000 [but that] . . . *this cost* is reasonable in light of the need to understand the nature and extent"
13 of the PCE contamination. (Exhibit 1, WCM Order, at 5)(emphasis added). Even if the Regional
14 Board has correctly estimated the cost of a workplan, the cost to carry out such an investigation will
15 surpass that estimate many times over. WCM has already undertaken – at great expense – two
16 extensive environmental studies of its property, in full compliance with Regional Board directives.
17 The first study involved obtaining and analyzing soil and groundwater from deep (up to 60 feet bgs)
18 bore samples from eleven locations selected by the Regional Board. (Exhibit 8, May 20, 2005
19 Report, at 1).⁴ The second study evaluated borings from an additional eight locations, also selected
20 at the direction of the Regional Board staff. (Exhibit 9, December 16, 2005 Report, at 1). WCM has
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23 _____
24 ⁴ Not only has WCM fully complied with all Regional Board directives and placed boring locations
25 as direct in the field by Regional Board staff, no other property owner in the vicinity has performed
26 analysis of any environmental conditions below 28 feet. In other words, the only residential
27 property owner in the area has conducted more extensive investigations and evaluated environmental
28 data to depths of 60 feet, which is far more than any of the many surrounding industrial and
commercial property owners, who are known to have used solvents, have done or even been asked to
do. (See, e.g., Exhibit 5 January 13, 2006 Tri-S Report at pp. 7-10). Indeed, MC has yet to conduct
any approved investigation.

1 already expended more than \$150,000 in environmental costs to date. Clearly, expending more to
2 investigate a seniors-only residential community that has already been extensively investigated
3 before the Regional Board obtains data from an approved study regarding the site of the former
4 electronics manufacturing plant is arbitrary and capricious and violates the law.

5 That the cost will be substantial is certain, but without carefully evaluating soil and
6 groundwater conditions at the location of the former electronics plant, the utility of a third study by
7 WCM is non-existent. (Exhibit 5, January 13, 2006 Tri-S Letter Report, at 2). As the Regional
8 Board admits “the need for further investigation on [the Walnut Creek Manor Property] cannot be
9 adequately evaluated without obtaining the additional soil and groundwater data at Mayhew Center.”
10 (Exhibit 4, August 4, 2006 Regional Board Letter to MC). Consequently, investigating a third soil
11 and groundwater investigation at the Walnut Creek Manor Property before obtaining the
12 environmental data from the critically important Mayhew Center site can produce no benefit, let
13 alone a benefit that outweighs the extensive additional cost. WCM does not ask the State Board to
14 order that further investigations never be conducted. Rather, because even the need for any such
15 investigation “cannot be adequately evaluated without obtaining soil and groundwater data at
16 Mayhew Center,” further investigation must be held in abeyance until such data are evaluated. It
17 likewise demonstrates the need for further investigation but at Mayhew Center, not at Walnut Creek
18 Manor. (*Id.*)
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23 **B. The State Board Must Direct the Regional Board to Hold in Abeyance the WCM**
24 **Order Because the Regional Board has No Basis to Suspect that the Walnut**
25 **Creek Manor Property is the Source of the PCE Contamination.**

26 The Regional Board lacks any reasonable basis, let alone substantial evidence, to suspect that
27 WCM or the Walnut Creek Manor Property – a seniors-only residential community – discharged
28 PCE at any time. Indeed, the Regional Board ignores the overwhelming evidence that establishes

1 that WCM is not a source of an historic PCE discharge and does not – and cannot – cite to any
2 evidence that would support a contrary conclusion.

3 All available data demonstrate that WCM is not the source of the PCE contamination.
4 (Exhibit 5, January 13, 2006 Tri-S Letter Report, at 2). As part of WCM's first environmental study,
5 at specific locations directed and approved by Regional Board staff, eleven bore holes were drilled to
6 60 feet below ground surface, sampled, and analyzed, eight on WCM property and three on MC
7 property near the WCM boundary. Of these, the eight boreholes on WCM property showed no
8 detectible PCE in soil or groundwater. The three boreholes drilled on MC property had elevated
9 PCE concentrations, which reflect contamination present at the Mayhew Center Property. (Exhibit 8,
10 May 20, 2005 Report, at 3-4). As the Regional Board has correctly recognized, these data "indicated
11 that soil and groundwater at [Mayhew Center] has been contaminated" with PCE. (See Exhibit 10,
12 July 29, 2005 Regional Board Section 13267(b) Order to MC). In order to better understand the
13 scope of the contamination on the Mayhew Center Property, the Regional Board sought follow-up
14 studies from both MC and WCM. *Id.* In full compliance and subject to the Regional Board's
15 approval, a second work plan, investigation and report was prepared and submitted. (Exhibit 9,
16 December 16, 2005 Report). This second, Regional Board-approved investigation obtained and
17 evaluated 32 soil samples at depths to six feet below ground surface. On December 16, 2005, WCM
18 provided the results of this investigation which, along with all available data, was carefully evaluated
19 by Joseph E. Odencrantz, Ph.D., P.E., in the January 13, 2006 Tri-S Letter Report. (Exhibit 5,
20 January 13, 2006 Tri-S Letter Report). Based upon this thorough evaluation of all available data, Dr.
21 Odencrantz categorically concluded that "Walnut Creek Manor is not a source of PCE." (*Id.* at 10)
22 There is no data or evidence presented in the challenged order that refutes Dr. Odencrantz's
23 conclusions.
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1 Despite the fact that the data do not support any suspicion that Walnut Creek Manor might be
2 the discharger of PCE, in an effort to rationalize a third investigation at WCM the Regional Board
3 persists and concocts a new theory that completely disregards all evidence and common sense. In
4 particular, the Regional Board imagines that there is some possibility that the regulatory-approved
5 removal of a 5,000-gallon diesel underground storage tank ("UST") more than eight years ago may
6 explain the cross-gradient PCE detected on Mayhew Center's property. As misguided support, the
7 Regional Board notes that when this UST was removed (ignoring the fact that it was removed in
8 compliance with all applicable laws and regulations) the samples taken at the time were not
9 investigated to establish the tank had not been "used for the disposal of wastes." (Exhibit 1, WCM
10 Order, at 3). First, the Regional Board is investigating the discharge of PCE and ignores that there is
11 absolutely no credible evidence to suggest the use or disposal of PCE at WCM at any location,
12 including the former diesel UST, at any time. Second, even if the Regional Board were to ignore the
13 fact that the diesel tank at no time held PCE or any other wastes, the testing done in 1998 established
14 that the UST did not leak. Moreover, in addition to the tests done in 1998 that demonstrate the UST
15 did not leak, WCM has since tested the soil and groundwater both upgradient and downgradient
16 from the former location of the UST. That analysis demonstrates that PCE does not originate from
17 the UST area or any other location at the residential property.⁵ The Regional Board's lame theory
18 suggesting the possible use and collection of PCE in an diesel underground storage tank is without
19 any basis in fact and cannot support a reasonable basis to suspect WCM of discharging PCE.
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23 Of course, nothing in the operational history of Walnut Creek Manor supports a suspicion of
24 PCE use. The Walnut Creek Manor has been in continuous operation – and under consistent

25 ⁵ Borings at location B2 and B3 (downgradient of the UST) "did not contain measurable levels of
26 PCE in any soil or groundwater sample" and at B8 (upgradient of the UST) "did not contain
27 detectable levels of PCE at any depth sampled." Exhibit 8, May 20, 2005 Report, at 10 and Table 2.
28 See, also, Exhibit 11, showing the location of the former diesel UST, sampling locations, and
groundwater gradient.

1 ownership and management – as a senior citizen apartment complex since it was first constructed
2 and opened in the mid-1960s. It is absurd to suspect that a retirement community discharged PCE,
3 yet the Regional Board demanded – and received – comprehensive soil and groundwater data from
4 WCM. In contrast, the Regional Board has had actual knowledge that the Mayhew Center Property
5 was home to an electronics manufacturer for nearly four years. Yet to date, it has obtained no
6 reliable data from MC and has pursued no effort to enforce any order seeking such data.
7

8 Furthermore, the State Board’s standards regarding the investigatory process further
9 undermine any basis to demand a third investigation at WCM at this time. The State Board has set
10 forth, in its Resolution 92-49, the criteria that are relevant to determine whether or not a party may
11 be required to undertake an investigation. While the list is not exclusive, the criteria mandate that
12 the Regional Board must weigh appropriate evidence before seeking a soil investigation. In
13 particular, Resolution 92-49 directs that the Regional Board focus on, not ignore, “documentation of
14 historical or current activities, waste characteristics [or] chemical use”, “[i]ndustry-wide operational
15 practices that historically have led to discharges,” “physical evidence, such as analytical data, soil or
16 pavement staining,” and “[r]efusal or failures to respond to Regional Water Board inquiries.” Res.
17 92-49 at I. Yet *none* of these criteria – or the others set forth in Resolution 92-49 – suggest that the
18 WCM can be suspected of discharging PCE and thus it is improper to demand further investigation
19 at this time. To the contrary, all of these criteria point to MC. Despite this, the Regional Board
20 has taken no enforcement action in the face of an unbroken history of foot-dragging by MC.
21 (Exhibit 2, November 3, 2006 Duane Morris Letter to Regional Board). Without a reasonable basis
22 to suspect that WCM is or was a discharger of PCE – whether based on a complete review of the
23 data, or a narrower view based on the State Board’s own criteria – the Regional Board lacks any
24 evidence to support the need or benefit from an investigation pursuant to the WCM Order at this
25 time. WCM respectfully requests that the State Board direct the Regional Board to hold in abeyance
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1 any requirement for an investigation pursuant to the WCM Order until such time that "soil and
2 groundwater data at Mayhew Center" is obtained and evaluated.

3
4 **III. The State Board Must Direct the Regional Board to Enforce Its Previous Section**
5 **13267(b) Orders Directed to MC as the Regional Board's Ongoing Pattern of**
6 **Failing to Enforce those Orders is Inappropriate and Improper.**

7 Despite multiple requests pursuant to Water Code section 13267(b) directed to the owners of
8 Mayhew Center, MC has not performed a Regional Board approved investigation into the PCE soil
9 or groundwater contamination which is critical to characterize the scope and extent of PCE
10 contamination at this former electronics manufacturing plant. Despite issuing Water Code section
11 13267(b) orders two years ago, (Exhibit 12, December 8, 2004 Regional Board Section 13267(b)
12 Order to MC)⁶, and again nearly 18 months ago (Exhibit 10, July 29, 2005 Regional Board Section
13 13267(b) Order), the Regional Board's enforcement efforts have been non-existent. (Exhibit 2,
14 November 3, 2006 Duane Morris Letter to Regional Board, outlining recalcitrance and foot-dragging
15 with respect to the MC investigation). Interspersed with a series of letters clarifying its requirement
16 that MC is obliged to comply with previous directives,⁷ the Regional Board has irrationally delayed
17 and consistently failed to enforce its previous orders.⁸

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20 ⁶ Following the receipt of this order, MC requested that the order to investigate be held in abeyance
21 based upon the unsupported and since refuted statement that "the Walnut Creek Manor site
22 investigation will exonerate my property from causing the groundwater pollution and would hence
23 dissolve the need for [MC] to investigate [its] property." (Exhibit 13, January 7, 2005 Dunivan
Letter to Regional Board.). Remarkably, with the Regional Board fully aware that the MC property
had been used as an electronics manufacturing plant, the MC request was nonetheless granted.

24 ⁷ See, e.g., Exhibit 14, September 27, 2005 Regional Board Notice of Violation; Exhibit 15,
25 November 14, 2005 Regional Board Letter to MC; Exhibit 16, January 4, 2006 Regional Board
26 Letter to MC; Exhibit 17, February 10, 2006 Regional Board Letter to MC; and Exhibit 18, March 6,
2006 Regional Board Letter to MC. *See also*, Exhibit 4, Regional Board Letter to MC, August 4,
2006.

27 ⁸ See, e.g., Exhibit 19, February 11, 2005 Regional Board Letter to MC; Exhibit 20, March 16, 2006
28 Regional Board Letter to MC.

1 The State Board, in reviewing the Regional Board's failure to act, has the authority to direct
2 the Regional Board to take specific enforcement action against the recalcitrant Mayhew Center. (23
3 Cal. Code Reg. §2052(a)(2)(C)). Here, the Regional Board's failure to pursue the requested
4 enforcement action is neither appropriate nor proper. The Regional Board's failure to enforce its
5 prior orders and obtain and evaluate data regarding soil and groundwater conditions at the site of a
6 former electronics manufacturing facility is inexplicable and undermines the credibility and integrity
7 of the process. Such favoritism in allowing MC's flagrant noncompliance to proceed for years
8 without consequence must be addressed without delay.

10 There has been ample evidence to immediately proceed with soil and groundwater
11 investigation at the Mayhew Center Property since at least May 30, 2003, when MC first provided
12 the Regional Board with formal notice that the Mayhew Center Property had once been home to a
13 "Semi-Conductor manufacturing company" under a previous owner. (Exhibit 6, May 30, 2003 MC
14 Letter to Regional Board). As soon as it became known to the Regional Board that the Mayhew
15 Center Property was once home to Etch-Tek, Inc., a manufacturer of printed circuit boards, a process
16 known to use chemicals including PCE, the Regional Board was derelict in failing to obtain an
17 investigation without delay. (Exhibit 5, January 13, 2006 Tri-S Letter Report; *see also*
18 <http://www.epa.gov/Region06/6en/xp/electron.pdf> (web address last accessed January 10, 2007)).
19 Under the standards set forth in Resolution 92-49, that the historical operations strongly indicate
20 PCE and other solvent use demanded prompt investigation, since "industry-wide operation
21 practices" is, for obvious reasons, a fundamental criteria used by the Regional Board to plan
22 investigations. (Res. 92-49, at I.A.4.)

25 But instead of obtaining pertinent data, the Regional Board commenced a pattern and
26 practice to defer and delay – and ultimately now seeks to abandon – any enforcement action against
27 the site that all objective evidence overwhelmingly supports is the source of the PCE problem. This
28

1 evidence includes historical aerial photographs that reflect a tank immediately adjacent to the PCE
2 hotspot at sample site B-7 (Exhibit 5, January 13, 2006 Tri-S Letter Report, at 2-6), historical
3 records from the City of Pleasant Hill Building Department documenting the presence of solvent
4 tanks at the Etch-Tek plant (*Id.*, Appendix Section 4), and county health department letters to Etch-
5 Tek outlining violations relating to chemical handling and storage at the Mayhew Center Property
6 (*Id.*, Appendix Section 3). Moreover, after Etch-Tek relocated to Concord, California, that facility
7 was the subject of investigation by the Regional Board, and PCE was detected in the soil and
8 groundwater in the vicinity of a tank and wastewater treatment facility, similar in appearance to the
9 tank located in the vicinity of the documented PCE contamination at the Mayhew Center site (*Id.*, at
10 Section II).

12 Despite clear and convincing evidence that Etch-Tek used PCE and was responsible for PCE
13 discharges at the Mayhew Center Property, the Regional Board acquiesced to MC's sandbagging and
14 has allowed MC to evade any meaningful investigation. The Regional Board has itself recognized
15 that MC's paltry efforts at compliance have left "most of the site . . . not investigated, including areas
16 where Etch-Tek (known to have used PCE) was located." (Exhibit 15, September 27, 2005 Regional
17 Board Notice of Violation to MC, at 2). Instead of backing its investigation directives with
18 meaningful enforcement, the Regional Board has consistently turned a blind eye as MC has
19 attempted to shift the focus away from its property and instead toward its senior-citizen residential
20 neighbor, Walnut Creek Manor. While such diversionary tactics have greatly benefited the MC
21 owners, it does not explain the Regional Board's history of inaction.

24 Without a clear directive from the State Board, the Regional Board can be expected to
25 continue to mismanage these investigations and accept MC's chronic refusal to investigate. The
26 contrast between the detailed investigation activity already performed at a seniors-only residential
27 facility with the paucity of investigation activity at the neighboring industrial plant is very
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1 disturbing. The Regional Board has failed to obtain any approved environmental investigation at a
2 parcel known to use solvents, even while recognizing that “the other parties, including Walnut Creek
3 Manor, are in compliance with Water Code section 13267 directives . . . regarding the current
4 investigation.” (Exhibit 4, August 4, 2006 Regional Board Letter to MC, at 2). By allowing the site
5 of historical electronic manufacturing operations to evade investigatory responsibility while
6 simultaneously seeking to foist a third investigation at the site of an historical residential property is
7 demonstrative of disparate and unfair treatment by a regulatory agency seeking to pacify and reward
8 a recalcitrant discharger for refusing to comply with prior directives. Such regulatory conduct is not
9 only unfair to parties like WCM who have complied with all prior regulatory directives, it
10 demonstrates regulatory bias and undermines confidence in the process.
11

12
13 **IV. The Regional Board Conduct Violates WCM’s Right to the Equal Protection of**
14 **the Laws by Arbitrarily Pursuing Regulatory Action Against One Party, While**
15 **Ignoring And Failing to Enforce Any Reasonable Regulatory Action In**
16 **Connection With A Party Owning Land Historically Used For Electronic**
17 **Manufacturing Operations.**

18 The Regional Board has admitted that the value of a third site investigation of the Walnut
19 Creek Manor property cannot be properly assessed without first obtaining environmental data, as
20 sought by previous Water Code section 13267(b) orders. (Exhibit 4, August 4, 2006 Regional Board
21 Letter to MC). Despite this, the Regional Board is demanding a further investigation by a seniors-
22 only residential community while simultaneously ignoring repeated failures by MC to comply with
23 the Regional Board’s previous orders. The Regional Board has issued a series of Water Code
24 section 13267(b) orders to MC demanding that it provide site histories and soil and groundwater data
25 directly relevant to the Regional Board’s investigation into the PCE contamination at issue here but
26 the Regional Board has yet to take any efforts to obtain compliance. Such disparate conduct by a
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1 regulatory agency goes far beyond the mere prosecutorial discretion and approaches a violation of
2 WCM's right to the equal protection of the law.

3 A regulatory agency does not have unlimited discretion in its enforcement. While
4 "[p]ursuing an investigation and imposing penalties against one company but not others for the same
5 act are not constitutional violations unless it can be shown the investigating agency purposefully and
6 intentionally singled out the one company for disparate treatment on an invidiously discriminatory
7 basis," the behavior and conduct of the Regional Board with respect to WCM and MC smacks of
8 purposeful discrimination by the Regional Board. *Pacific Bell Wireless, LLC, v. Public Utilities*
9 *Com.* 140 Cal. App. 4th 718, 737 (Cal. Ct. App. 2006) (quoting *Snowden v. Hughes*, 321 U.S. 1
10 (1944)). It is true that "invidious discrimination is more likely to be found in those instances where
11 some fundamental right is impermissibly restricted or threatened to be restricted as, for instance, the
12 right to vote," *Brown v. Superior Court*, 5 Cal. 3d 509, 523 (1971). Nevertheless, even in a
13 regulatory context, such uneven and baseless treatment by the government can violate the right to
14 equal protection if there is no rational basis for state action that is "malicious, irrational or plainly
15 arbitrary." *Squaw Valley Development Company v. Goldberg*, 375 F.3d 926, 944 (9th Cir. 2004).

16 The Regional Board's conduct toward Walnut Creek Manor treads very closely to conduct
17 that was held to be actionable in *Squaw Valley*. The ongoing campaign by the Regional Board has
18 been, if not necessarily malicious, then certainly "irrational or plainly arbitrary." The Regional
19 Board is in possession of clear and convincing evidence establishing that WCM is not the source of
20 PCE contamination but ignoring all credible evidence chose to issue yet another Water Code section
21 13267(b) order demanding a third investigation that it acknowledges is at best premature. In
22 contrast, the Regional Board is in possession of unrefuted evidence and scientific opinion
23 establishing that the PCE contamination originated on the Mayhew Center Property and has yet to
24 take any action to enforce repeated orders requesting a soil and groundwater site evaluation from
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1 MC. Moreover, not only has the Regional Board failed to enforce *any* of its previous Water Code
2 section 13267(b) orders to obtain data from MC, it has chosen to forgive and ignore MC's long
3 history of recalcitrance. (See, *e.g.*, Exhibit 2, November 3, 2006 Duane Morris Letter to Regional
4 Board).

5 Seeking compliance from WCM while ignoring MC's repeated failure to provide any reliable
6 data to the Regional Board, under the totality of the circumstances, is baseless and violates WCM's
7 right to the equal protection of the law.
8

9 **V. The State Board Is Respectfully Requested to Stay the Enforcement of the**
10 **WCM Order Pending Resolution of this Petition.**

11 Section 13321(a) of the California Water Code provides that the State Board may stay the
12 effect of an order issued pursuant to Section 13267(b) and shall issue such a stay provided that
13 WCM can establish: (a) WCM will suffer substantial harm if a stay is not granted, (b) there is a lack
14 of substantial harm to other parties and the public interest if the stay is granted and (c) there are
15 substantial questions as to law or fact in the disputed matter. 23 Cal. Code Reg. §2053.
16

17 As set forth above, WCM has already expended more than \$150,000 in environmental
18 consulting costs and investigations in its effort to cooperate fully with the Regional Board. This
19 extensive and unparalleled effort has demonstrated conclusively that Walnut Creek Manor is not the
20 discharger of PCE and did not discharge the PCE contamination present at Mayhew Center, a
21 property previously occupied by an electronics manufacturing plant. There are, in addition,
22 substantial questions of law and fact that the State Board needs to resolve to determine whether or
23 not the Regional Board has the authority to issue a third Water Code section 13267(b) order at this
24 time. Moreover, compliance with the burdensome and presently unnecessary WCM Order, prior to
25 any available data from the obvious source of the PCE contamination, will result in
26 disproportionately large expenses or the possibility of unwarranted fines.
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1 Nor will the public, nor any other party, be harmed if the stay is granted. As demonstrated
2 above, the Regional Board's current process is (at best) haphazard. By requiring the Regional Board
3 to seek additional data from Mayhew Center first, the public will – if anything – be better served by
4 assuring a more complete, accurate, and efficient process to determine the scope of the PCE
5 contamination. Finally, MC will not be harmed by such a stay. As the Regional Board has correctly
6 noted, MC must first conduct a complete soil and groundwater investigation before the need for
7 further investigation at WCM can be determined. (Exhibit 4, August 4, 2006 Regional Board Letter
8 to MC). Issuing a stay to WCM does nothing to alter MC's ultimate obligations since further tests
9 on WCM cannot – by themselves – address the scope of PCE contamination at Mayhew Center and,
10 as such, imposes no new obligations on MC.
11

12 For the foregoing reasons, the State Board may and should stay the enforcement of the WCM
13 Order pending the resolution of this petition.
14

15 **5. MANNER IN WHICH THE PETITIONER IS AGGRIEVED**

16

17 The Regional Board has ignored and refuses to enforce the requirements of Section 13267 of
18 the Water Code. The Water Code requires that the Regional Board have a "reasonable suspicion"
19 prior to requiring a site investigation and that any such investigation must "bear a reasonable
20 relationship to the need for the report." At the present time, given the lack of investigatory analysis
21 regarding the site of the former electronics manufacturing facility, conducting a third site
22 investigation at Walnut Creek Manor would be manifestly unreasonable and premature. As the
23 Regional Board previously agreed "the need for further investigation on [WCM property] cannot be
24 adequately evaluated without obtaining additional soil and groundwater data at Mayhew Center."
25 (Exhibit 4, August 4, 2006 Regional Board Letter to MC) As a consequence, mandating a third
26 investigation at Walnut Creek Manor before any investigation at Mayhew Center does not "bear a
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1 reasonable relationship to the need for the reports and the benefits to be obtained from the reports.”
2 Instead, the Regional Board should be directed to pursue enforcement action against the recalcitrant
3 Mayhew Center.
4

5 **6. SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**
6 **PETITIONERS REQUEST**

7 First, WCM requests that the State Board hold in abeyance to the WCM Order to the extent
8 that it purports to require any actual investigatory efforts prior to the receipt, review and analysis of
9 appropriate and approved soil and groundwater data necessary to properly characterize the scope and
10 extent of PCE contamination present at the site of the former electronics manufacturing plant. This
11 request is supported by the lack of any evidence supporting a suspicion that Walnut Creek Manor
12 discharged PCE or is a source of the PCE contamination and that the burdens imposed by the WCM
13 Order of conducting a third investigation prior to any available data from the Mayhew Center
14 property do not meet the cost-benefit analysis required by Water Code section 13267(b).
15

16 Second, WCM requests that the State Board stay the enforcement of the WCM Order
17 pending the resolution of this petition.
18

19 Third, WCM requests that the State Board direct that the Regional Board commence
20 enforcement action against Mayhew Center to obtain compliance with the previously issued, but
21 repeatedly ignored, Water Code section 13267(b) orders directing that soil and groundwater
22 investigation and site characterization be performed. In contrast to WCM, all available data and
23 application of the State Board’s criteria set forth in Resolution 92-49 directly points to Mayhew
24 Center as the discharger and source of the PCE contamination. Despite this, the Regional Board has
25 inexplicably failed to enforce any of its prior Water Code section 13267(b) orders.
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1 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
2 **ISSUES RAISED IN THE PETITION**

3 See above.

4 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL**
5 **BOARD AND TO DISCHARGER, IF NOT THE PETITIONER**

6 A true and correct copy of this Petition was sent via Federal Express on January 12, 2007 to
7 the Regional Board at the following address:

8 Mr. Bruce H. Wolfe
9 California Regional Water Quality Control Board
10 San Francisco Bay Region
11 1515 Clay Street, Suite 1400
12 Oakland, California 94612

13 A true and correct copy of this Petition was sent via Federal Express on January 12, 2007 to
14 the Discharger at the following address:

15 Mayhew Center LLC
16 3317 Vincent Road
17 Pleasant Hill, California 94523
18 Attention: Dean Dunivan

19 **9. A STATEMENT THAT SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN**
20 **THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD**

21 All substantive issues and objections raised herein have been raised before the Regional
22 Board.

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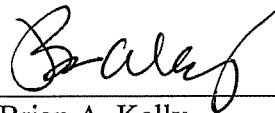
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3 **10. PETITIONERS' REQUEST FOR EVIDENTIARY HEARING**

4 For the reasons set forth above, WCM requests that the State Board conduct a full evidentiary
5 hearing to consider this Petition along with supporting evidence in accordance with 23 CCR §2502.
6

7 Respectfully Submitted,

8 DATED: JANUARY 12, 2007

DUANE MORRIS LLP

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11 Brian A. Kelly
12 Attorneys for Walnut Creek Manor

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EXHIBITS

Exhibit 1	December 14, 2006 WCM Order
Exhibit 2	November 3, 2006 Duane Morris Letter to Regional Board
Exhibit 3	December 14, 2006 MC Order
Exhibit 4	August 4, 2006 Regional Board Letter to MC
Exhibit 5	January 13, 2006 Tri-S Letter Report
Exhibit 6	May 30, 2003 MC letter to Regional Board
Exhibit 7	January 30, 2002 Aqua Science Engineers Report
Exhibit 8	May 20, 2005 Report
Exhibit 9	December 16, 2005 Report
Exhibit 10	July 29, 2005 Regional Board Section 13267(b) Order to MC
Exhibit 11	Groundwater Gradient Map & Sample Locations
Exhibit 12	December 8, 2005 Regional Board Section 13267(b) Order to MC
Exhibit 13	January 7, 2005 Dunivan Letter to Regional Board
Exhibit 14	September 27, 2005 Regional Board Notice of Violation
Exhibit 15	November 14, 2005 Regional Board Letter to MC
Exhibit 16	January 4, 2006 Regional Board Letter to MC
Exhibit 17	February 10, 2006 Regional Board Letter to MC
Exhibit 18	March 6, 2006 Regional Board Letter to MC
Exhibit 19	February 11, 2005 Regional Board Letter to MC
Exhibit 20	March 16, 2006 Regional Board Letter to MC